UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

TONAWANDA COKE CORPORATION
and MARK L. KAMHOLZ,

Defendants.

DEFENDANT KAMHOLZ'S REPLY TO GOVERNMENT'S SENTENCING MEMORANDUM RESPONSE

Cri. No. 10-CR-219

INTRODUCTION

The Government's Response to Defendant Mark L. Kamholz's Sentencing Memorandum, filed September 30, 2013, [Doc. No. 245] ("Government's Response") continues to take liberties with the record in an effort to paint Mark L. Kamholz in the worst possible light. This reply pleading will address each of the Government's arguments in its Response seriatim. As appropriate, to the extent the Government restates arguments made in its original sentencing submission, reference will be made to Mr. Kamholz's response to that submission (Defendant Kamholz's Response to Government's Sentencing Memorandum, filed September 30, 2013 [Doc. No. 242] ["Defendant Kamholz's Response"]).

REPLY TO GOVERNMENT'S ARGUMENTS

I. Mr. Kamholz's "control" over environmental compliance activities at Tonawanda Coke

The defense stipulated during trial that Mr. Kamholz was the Environmental Control Manager at Tonawanda Coke and, as such, handled environmental issues at the plant. *See* **Exhibit A**, excerpt of March 12, 2013 trial testimony of Jon Rogers, at 17, lines 16-18. As well, a

number of company employees testified at trial that Mr. Kamholz was the individual who would be consulted with respect to environmental matters. As disclosed in Mr. Kamholz's Sentencing Memorandum, filed September 16, 2013 [Doc. No. 238], the defendant is a salaried employee, who is paid $75,000 annually. He is neither an officer nor owner of the company. The available evidence does not support the exaggerated statement that Mr. Kamholz "had complete control over environmental compliance activities at Defendant Tonawanda Coke Corporation." Government's Response at 2.

II. Mr. Kamholz's interaction with NYS DEC Inspector Foersch regarding the need for baffles

In its Response, at 2, the Government argues that New York State Department of Environmental Conservation [NYS DEC] Inspector Gary Foersch "at no time [told] Defendant Kamholz he could operate the tower without baffles". This statement is misleading, as it ignores the substance of Mr. Foersch's trial testimony. That testimony indicated that he engaged in an ongoing dialogue with Mark Kamholz regarding the need for baffles in Tonawanda Coke's quench towers. The upshot of Mr. Foersch's testimony was that he "looked the other way" on the baffles issue. *See* Defendant Kamholz's Response at 12-13. Indeed, during his trial testimony, Mr. Foersch conceded that he had told a defense investigator in January 2010 that he knew there were no baffles in quench tower #2, and that he "had a gut feeling that there weren't baffles in there." *See* **Exhibit B**, excerpt of March 20, 2013 trial testimony of Gary Foersch, at 114, lines 17-18. While it might be literally true to contend that former Inspector Foersch never expressly told Mr. Kamholz this quench tower

could be operated without baffles, the clear implication of the parties' interaction was that this was permissible.

III. Mr. Foersch's contention the defendant misrepresented the presence of baffles in quench tower #2

Continuing this same line of argument, the Government makes reference to former Inspector Foersch's trial testimony that, approximately one year after having supposedly directed Mr. Kamholz to install baffles in tower #2, Mr. Foersch checked back with the defendant and was falsely advised that baffles had been installed in this facility. Government's Response at 2. Despite Mr. Foersch's central role as an inspector at the Tonawanda Coke plant during the time period covered by the trial evidence, the Government did not call him as a witness. He was subpoenaed and produced by the defense.

During his direct examination, he testified that his last inspection of quench tower #2 occurred in "[p]robably 2005, in that area." **Exhibit B** at 70, line 16. Mr. Foersch testified that he could not recall exactly what he observed inside the tower, but it clearly was a violation to the rule requiring the presence of baffles. *Id.* at 71, lines 12-19. The witness recounted that he reminded Mr. Kamholz of the baffles requirement after this inspection, but never again checked to see if baffles were present. *Id.* at 72, lines 3-9. When then asked on his direct examination if he had any additional conversations with Mr. Kamholz regarding the purpose served by baffles in quench towers, Mr. Foersch responded: "No, I don't believe we discussed it after that." *Id.* at 73, line 8. No mention was made by the witness of any further discussion with Mr. Kamholz regarding whether or not baffles had been installed in tower #2.

When, however, questioned by the Government, Mr. Foersch contended that, approximately one year after his last inspection of tower #2, he had specifically asked Mr. Kamholz if baffles had been installed, and recalled that the defendant had responded affirmatively. *Id.* at 109, lines 5-10. Further examination of Mr. Foersch on this subject disclosed that, despite being twice interviewed by a private investigator, testifying in the grand jury, and being questioned by a NYS DEC attorney, Mr. Foersch had never disclosed this claimed conversation with Mr. Kamholz. Stated otherwise, Mr. Foersch did not "recall" this interaction until three years later in the courtroom.

In particular, Mr. Foersch acknowledged that he had spoken to a private investigator, Thomas Thurston, on two occasions in January 2010, and had been given the opportunity to review the two reports prepared by Mr. Thurston. *Id.* at 73, lines 15-25. Mr. Foersch agreed that Investigator Thurston had, during his second interview, given the witness an opportunity to read the report of the initial interview, which included the statement that Mr. Foersch was fully aware neither quench tower at Tonawanda Coke had baffles. *Id.* at 74, line 18 to p. 75, line 21. The only disagreement Mr. Foersch had with the initial Thurston report was the statement that he was "fully" aware baffles were not present. *Id.* at 75, line 22 to p. 76, line 3. Mr. Foersch acknowledged that he otherwise was in agreement with the content of the initial Thurston report. *Id.* at 77, line 20 to p. 78, line 2. Copies of the two Thurston reports are annexed as **Exhibit C**. In neither interview with Mr. Thurston in January 2010 did Mr. Foersch make reference to this supposed conversation with Mr. Kamholz when it was purportedly misrepresented that baffles were present in tower #2.

Mr. Foersch was also shown his grand jury testimony from July 29, 2010. In that testimony, after making reference to having looked in tower #2 and seeing baffles in disrepair, he had been asked "'Did you follow up with him?'" Mr. Foersch's response was "'No.'" **Exhibit B** at 116, line

19 to p. 117, line 3. Mr. Foersch agreed he made no mention before the grand jury in this context nor otherwise that he had this later conversation with Mr. Kamholz. *Id.* at 117, lines 4-8. When then re-examined by the Government, Mr. Foersch first mistakenly contended he had never been asked in the grand jury if he did any follow up. He was then reminded that he had specifically been asked this question. *Id.* at 118, lines 16-22. Mr. Foersch then rationalized that his response that he did no follow up was a reference to "the short-term, like within a month or two, and not that I never inquired about it again." *Id.* at 119, lines 11-19. It was disclosed, however, that later in his grand jury testimony, he was specifically asked if he had *ever* spoken to Mr. Kamholz again. Mr. Foersch testified in the grand jury "That I don't remember if I did or not." *Id.* at 120, lines 9-14.

Mr. Foersch was also interviewed by a NYS DEC attorney, Teresa Mucha, Esq., on January 7, 2010 regarding his contact with Investigator Thurston. A copy of Ms. Mucha's summary of this interview is annexed as **Exhibit D**. The Mucha summary reveals that Mr. Foersch specifically referred to his inspections of quench tower #2, and that he told Ms. Mucha he had *not* inspected that tower at any point after Mr. Kamholz had requested permission to reduce the height of this tower (in December 2006). *Id.* at 1-2. In addition to being inconsistent with Mr. Foersch's contention at trial that he had looked inside this tower on one later occasion, Mr. Foersch's statements to Ms. Mucha also did not include any reference whatsoever to the claimed misrepresentation regarding baffles referenced by Mr. Foersch in response to Government questions at trial.

Mr. Foersch's trial testimony that the defendant had lied to him regarding the installation of baffles in tower #2 approximately one year after Foersch's last inspection of that facility is highly suspect. Despite earlier opportunities in three different contexts to bring up this alleged

conversation, as well as during his direct examination at trial by the defense, this claimed discussion with Mr. Kamholz was never mentioned. At minimum, whether or not this conversation ever took place is in serious doubt, and does not represent a factor which should be considered by the Court in determining an appropriate sentence for the defendant.

IV. Trial evidence regarding PRV's prior use as emergency release valve

The Government contends that "there is no basis in the trial testimony" for arguing that, at one time, the pressure relief valve ["PRV"] in the By-products area functioned as an emergency valve. Government's Response at 3. The evidence developed at trial did disclose that a NYS DEC Air 100 Permit was never issued for the PRV. The diagrams of the By-products department that were prepared in the 1980s for the purpose of identifying permitted emission points did not identify the PRV. One of the Government's expert witnesses, Alfred Carlacci, a NYS DEC Inspector, confirmed that, at least as far back as 1984, "we exempted anything that dealt with emergency situations." *See* **Exhibit E**, excerpts of February 28 and March 1, 2013 trial testimony of Alfred Carlacci, March 1, 2013 excerpt at 399. This exemption meant that emergency relief vents were not subject to the agency's permitting requirements. *Id.* at 398. In 1996, this exemption continued, but the emergency relief vent exception was moved to a different category dealing with trivial activities. *Id.* at 399. That exemption has continued to be recognized without change up to the present. *Id.* While, by comparison, there was testimony from a number of witnesses at trial regarding the frequency of releases by the PRV, that evidence was either limited to the timeframe of the Indictment (2005-2009), or otherwise not associated with any particular period of time. From this set of

circumstances, embodied in the trial record, an inference can fairly be drawn that supports Mr. Kamholz's recollection that the PRV originally acted as a backup device.

Mr. Kamholz's explanation finds further support in the June 1977 correspondence from the NYS DEC to Tonawanda Coke's predecessor, acknowledging the existence of what is identified as a "Gas Bleeder Vent" on the coke oven gas line which was treated as an exempt emission point in accordance with 6 NYCRR 212.8(b). This letter, and an accompanying schematic, are annexed to Mr. Kamholz's Sentencing Memorandum as Exhibit D. It is acknowledged that there is an inconsistency in the location of this vent on the schematic, which Mr. Kamholz believes to have been an error, but the existence of this reference does in a meaningful way lend support to Mr. Kamholz's recollection of how the PRV was viewed when he first joined Tonawanda Coke in the late 1970s and for many years thereafter. *See also* Defendant Kamholz's Response, at 29-30.

V. PRV reference in July 2003 emissions study

Throughout trial, and in the context of these sentence proceedings, Mr. Kamholz has taken the position that the July 2003 Hazardous Air Pollutant Emission Inventory, marked Government Exhibit 131 at trial, includes an express reference to the PRV in the By-products area in a table located on page 4-2 of the report. The Government argues that "[t]here is no basis to conclude" that this study provided sufficient notice regarding the existence of the PRV to the NYS DEC. Government's Response at 3. In support of its position, as it has done in an earlier pleading, the Government claims that the PRV reference at page 4-2 of the report could have been to either a valve on the light oil scrubber column or to a water seal bleeder located near the Boilerhouse. *Id.* at 3 n.1

The defense has already addressed the Government's contentions, and will not repeat those arguments here. *See* Defendant Kamholz's Response at 6-8. Looking at the July 2003 study in its proper context, it becomes apparent that the PRV reference on page 4-2 constituted an explicit reference to the PRV in the By-products area.

VI. Reference in RCRA inspection report to mixing KO87 with coal

In reference to the RCRA charges in the Indictment, the Government contends that "none of the historical RCRA inspection reports noted where the KO87 waste was being mixed with the coal[.]" Government's Response at 4.

At trial, a February 17, 1989 Division of Solid and Hazardous waste inspection report having reference to the Tonawanda Coke facility was marked as Defendants' Exhibit B. A copy is annexed as **Exhibit F**. On page D B-005 of this report, the following is indicated: "The KO87 sludge being removed from one decanter tank during tank cleaning procedures is premixed with raw material pulverized coal ,wetted with approx 3-4 quarts of used oil per ton of coal/sludge mixture, and fed as raw material into the coke oven battery." **Exhibit F** at D B-005 [underlining added]. The NYS DEC well knew, at least as of 1989, that the company was mixing its KO87 coal tar sludge with raw material coal for use as part of the coking operation. The coal was then and always has been located on the coal fields at the plant. As of 1989, the concrete pad did not exist; accordingly, there can be no argument that the NYS DEC's hazardous waste inspectors understood the mixing was taking place on this pad.

VII. NYS DEC Inspector Corbett's June 2009 awareness the Barrett Tank contents would be mixed with coal

The Government repeats another argument which has already been addressed; that is, that NYS DEC Inspector Thomas Corbett testified at trial that, during a June 2009 interaction with Mr. Kamholz, he was not informed as to the location where the contents of the Barrett Tanks would be mixed with coal. Government's Response at 4. The Government's recollection of Mr. Corbett's trial testimony is incorrect. This issue is referenced in Defendant Kamholz's Response at 28, and is discussed in more detail in Tonawanda Coke's Response to the Government's Sentencing Memorandum, filed September 30, 2013, [Doc. No. 241] at 7-8 n.2. The transcript of Mr. Corbett's trial testimony discloses he expressly testified that he understood the recycling was to occur on the "[c]oal pile located in the coal field." Defendant Kamholz's Response at 28.

VIII. Mr. Kamholz's May 2008 awareness of a benzene issue at Tonawanda Coke

The Government contends that Mr. Kamholz was aware "that substantial evidence had been developed that Tonawanda Coke was responsible for such elevated levels of benzene." Government's Response at 4. The Government does not specifically identify the basis for this assertion; however, evidence was presented at trial regarding a visit made to Tonawanda Coke by NYS DEC inspectors in May 2008. One of the attendees, NYS DEC Inspector Alfred Carlacci, testified about this meeting at trial. Mr. Carlacci explained in his testimony that the NYS DEC had conducted an air monitoring study during the period July 2007 through July 2008. *See* **Exhibit E**, excerpt of Alfred Carlacci's February 28, 2013 trial testimony at 271, lines 17-18. The witness described the information available as of the time of the May 2008 meeting with Mr. Kamholz as

"some preliminary data, you know, that – that showed concern for benzene emissions." *Id.* lines 5-6. Mr. Carlacci explained the purpose of the meeting to have been "just to see if we can work together to figure something out to kind of take a look at the by-products plant, you know, together." *Id.* at 275, lines 7-10. Given Mr. Carlacci's description of the information then available to the NYS DEC, it vastly overstates the trial record to assert that Mr. Kamholz was at any time aware of "substantial evidence" regarding a benzene problem at Tonawanda Coke.

IX. April 14, 2009 opening interview with regulators

The Government continues by re-stating an argument already presented in an earlier pleading that Mr. Kamholz "told EPA officials during the opening conference of the [April 2009] inspection that there were no pressure relief valves at the facility[.]" Government's Response at 4-5. Although not specifically articulated in the Government's Response, it is understood that this argument is premised upon a single entry in a logbook of EPA Inspector Martha Hamre. As explained in Defendant Kamholz's Response, at 31-32, the meaning of the "Pressure relief valves - no" entry in Ms. Hamre's logbook was fully explored at trial, which included giving consideration to the context in which this entry was made by Ms. Hamre. As also noted in Mr. Kamholz's response pleading, this claimed representation by Mr. Kamholz was not later mentioned in Ms. Hamre's October 2009 report of the inspection, including in particular her discussion of the PRV in the By-products department.

X. Release of the PRV during the April 2009 inspection

The Government once again makes reference to the fact Mr. Kamholz referred all questions regarding the history and operation of the PRV to then By-products area supervisor Patrick Cahill when the PRV released during the April 2009 inspection. The entire context of this event, and the reasons why Mr. Kamholz relied upon Mr. Cahill, are addressed in detail in Defendant Kamholz's Response, at 8-10. It was entirely appropriate for the defendant to refer questions related to the operation of equipment located in a particular department at the plant to the supervisor of that department.

XI. Pressure setting of the PRV following the April 2009 inspection

The Government contends that Mr. Kamholz "told the NYS-DEC that the pressure setting for the bleeder valve had been raised, yet, the by-products logbooks do not bear this out." Government's Response at 5. At trial, the Government was permitted to admit into evidence summaries of what were described as "Bleeder Releases" for a time period which included May through December 2009. The summary sheets also contained an indication of the pressure setting of the PRV, which was based upon an examination of the contents of the By-products logbook. The defense took the position that the summaries were unreliable for a variety of reasons, including the failure to fully consider the PRV settings identified in these logbooks, which represented the primary source for the number of releases of the PRV shown on the summaries.

Copies of the Government's summaries for the period May through December 2009, marked Government Exhibits 204-211 at trial, are annexed as **Exhibit G**. Read together, the summaries

reflect that, from May 22, 2009 through December 9, 2009, the PRV pressure settings remained a constant 110.

In contradiction of this finding, the By-products logbook for the period May 10, 2009 through September 29, 2009, marked Government Exhibit 88 at trial, includes an entry on July 30, 2009 as follows: "We do have radios & a phone, if Mr. Cahill makes an adjustment on anything I believe it would be appropriate to inform operators". *See* **Exhibit H**, excerpt of Government Exhibit 88 at 088-0122. Mr. Cahill, who was then the supervisor of the By-products area, provided conflicting testimony at trial regarding when entries were recorded in the logbook. A copy of excepts of his March 5 and March 6, 2013 testimony on this subject is annexed as **Exhibit I**. At several points, he indicated that changes in the PRV pressure setting would generally be placed in the logbook, yet at other times he said the entries were not made on a regular basis and that his own changes in the pressure setting would not be entered in that document.

The Government's summaries were shown at trial to not be a reliable indicator of the pressure settings for the PRV. A specific entry in the logbooks regarding a reference to a change made by Mr. Cahill on or about July 30, 2009 was simply ignored. As well, trial witness James Cratsley testified that, as of the time the search warrant was executed in December 2009, the PRV setting was at 150, 40 points higher than the setting reflected in the Government's summary for December 2009 and earlier months (**Exhibit G**).

In sum, the trial record does not support the Government's blanket assertion that Mr. Kamholz misrepresented the setting of the PRV to NYS DEC personnel following the April 2009 inspection.

XII. Mr. Kamholz's October 2009 description of the PRV's operation

Included with the Government's Response at Exhibits 1 and 2 are a September 2009 Request For Information forwarded to the defendant, and his October 2009 response. The Government notes in its submission that Mr. Kamholz recites in his response that the PRV "'opens very rarely'" and that "'emissions have not been reported because they are believed to be deminimus.'" Government's Response at 5.

As noted above, the Government's summary of PRV releases during 2009 was shown at trial to not be a reliable indicator of the operation of the PRV, including the time period after the April 2009 inspection. Also, as demonstrated at trial, the instructions for completing the Request For Information suggested that, unless otherwise indicated in the question, current information was being sought for each request. *See* Government's Response, Exhibit 1, at 126-0008. In the case of the PRV, the only inquiry seeking historical information was reflected in question #20(d), which sought monitoring records for the PRV dating back five years. *Id.* at 126-0012. Upon this basis, in his answers, Mr. Kamholz provided information current as of the fall 2009. *See* Government's Response, Exhibit 2, at 127-0006 to 127-0007. In particular, in response to question #20(d), his statement that the "PRV opens very rarely" and to question #20(f) that the PRV's emissions "are believed to be deminimus[,]" were not false or misleading. *Id.* With the exception of the discredited Government summaries of PRV releases, based as they were on a wholly subjective reading of the By-products logs, there was no trial evidence contradicting Mr. Kamholz's statements.

The Government additionally notes that, in his response to question #20 (Government's Response, Exhibit 2, at 127-0006), the defendant indicated he had consulted with Mr. Cahill. The Government observes that, during cross-examination, Mr. Cahill had stated that, following the walk

through in the By-products area with Mr. Kamholz prior to the April 2009 inspection, "he never spoke to defendant Kamholz about the PRV again." Government's Response at 5 [footnote omitted]. For whatever reason, during its direct examination of Mr. Cahill at trial, the Government never inquired if he had been consulted by Mr. Kamholz in or about October 2009 regarding the operation of the PRV. Instead, in making its argument in its response pleading, reliance is placed by the Government on a series of questions asked during Mr. Cahill's cross-examination, all having to do with the absence of any follow up by Mr. Kamholz with Mr. Cahill regarding the PRV in the context of the April 2009 inspection. While Mr. Cahill did agree, in response to the last question asked on this subject, that "up to the present, Mr. Kamholz has never discussed with you anything further about that pressure relief valve," this question had nothing to do with Mr. Kamholz's completion of the Request For Information in the fall 2009. That question was not specifically posed by the Government to Mr. Cahill at trial.

XIII. Mr. Kamholz's Request For Information response with respect to the pilot on the battery flare

In the context of discussing the defendant's responses to the September 2009 Request For Information, it is also claimed that Mr. Kamholz's answers regarding the pilot light on the battery flare stack evidenced a "lack of candor with the EPA." Government's Response at 5 n.3. In this context, specific reference is made to question #32 on the Request For Information. These questions are set out in Exhibit 1 to the Government's Response, at 126-0015. The questions relate generally to when the pilot light was installed, how the pilot light was monitored, the existence of documentation regarding when the "thermocouple or equivalent device" was in and out of service

during the preceding five years, and the existence of documentation regarding maintenance and repair of the pilot light over that same period of time. In his response to question #32, found at Exhibit 2, pages 127-0009 to 127-0010 of the Government's Response, Mr. Kamholz indicated that the flare was installed on March 31, 1994. He also explained how the thermocouple in the flame was monitored. He responded that service records did not exist, and further noted that it had been determined on August 21, 2008 that the pilot was not operating.

The Government criticizes the fact that Mr. Kamholz, in his response, did not volunteer that the pilot light had not been operating since in or about the mid-90s. Government's Response at 5 n.3. Approximately one year earlier, however, the absence of a fuel supply to the battery flare's pilot light had been addressed with the NYS DEC. *See* **Exhibit K**, September 9, 2008 NYS DEC inspection report. The ongoing interaction between the EPA and the NYS DEC, particularly as evidenced during the April 2008 inspection at Tonawanda Coke, explains why the defendant would have not provided greater detail in answering the Request For Information in October 2009.

XIV. Mr. Kamholz's acceptance of responsibility

The Government contends that Mr. Kamholz's Offense Statement is a self-serving document which "rationalizes the crimes as some sort of miscommunication between [Mr. Kamholz] and others." Government's Response at 6. The subject of Mr. Kamholz's acceptance of responsibility is detailed in his Sentencing Memorandum at 23-26. Those same explanations of the defendant's acceptance will not be repeated here. Mr. Kamholz's Offense Statement focuses upon his failed communications because the greater degree of the Indictment's focus was on this topic. This was particularly true with respect to the absence of baffles in the #2 quench tower and the presence of

the PRV in the By-products area at the plant. It would also be reasonable to expect that, in addressing an Obstruction of Justice charge premised upon a statement made by the defendant, he would focus upon his poor communication skills in accepting responsibility for his conduct.

XV. Avoiding sentence disparity

At 6-7, the Government's Response addresses the issue of avoiding unwarranted sentencing disparity. The end result of this discussion is a suggestion that the case most analogous to Mr. Kamholz's circumstance is *United States v. Atlantic States, et al.*, which is summarized in Exhibit 2 to the Government's Response, at 2. That summary indicates that the underlying criminal violations at a pipe foundry were not limited to environmental issues, but also encompassed workplace infractions. One worker died as a result of these violations. The indictment consisted of 34 counts. The summary recites that "[e]vidence at trial proved a corporate philosophy and management practice that led to an extraordinary history of environmental violations, workplace injuries and fatalities, and ultimately obstruction of justice." *Id.* at 3. The referenced injuries included one employee who lost three fingers in a workplace accident, and another who lost an eye. The counts of conviction included Clean Water Act violations involving the discharge of petroleum contaminated water directly into storm drains leading to the Delaware River. The summary recites that "tires and excessive amounts of hazardous paint waste" were burned in a cupola, accident scenes were "systematically altered," and federal, state and local officials investigating the violations were "routinely lied to." *Id.*

The *Atlantic States* decision is officially reported as *United States v. Maury*, 695 F.3d 227 (3d Cir. 2012). That decision provides additional detail on the background facts. 695 F.3d at 232-

243. The Clean Water Act violations also included the disposal of contaminated cement debris and hydraulic oil, causing three different major oil sheen deposits on the Delaware River. Employees were instructed to pump wastewater into tanks until they overflowed into storm drains, and to directly pump wastewater into street storm drains. Paint waste was stored in barrels for later burning. The filled barrels were hidden under scrap metal. The employee fatality resulted from the victim being run over by a forklift driven by an untrained driver who had a history of a prior accident. When questioned about this incident, personnel at the plant lied to inspectors. False information was produced regarding the operation of the forklift, and the driver's earlier accident was concealed. At first, the defendants lied to investigators regarding the employee's death, claiming that he had only suffered minor injuries and had returned to work the following day. Throughout the period of the investigation, the evidence disclosed that employees had been instructed to lie under the threat that they would be discharged if they did not do so.

The Government argues that the manager of this plant, who received a jail sentence of 70 months, is similarly situated to Mr. Kamholz. In reality, the Tonawanda Coke and *Atlantic States* cases stand in stark contrast to one another. A fair comparison of the facts of the two cases discloses that they have little, if anything, in common. In the instant case, there is no evidence of death or employee injury. There is no pattern of obstructive behavior, or threats of job loss if ownership's scheme to conceal their improper activities was not perpetuated by plant employees. There is no evidence of actual environmental contamination, much less on a repeated basis.

The Court should categorically reject the Government's misplaced attempt to analogize these two cases for the purpose of Mr. Kamholz's sentencing.

CONCLUSION

Mr. Kamholz continues to urge the Court to consider the imposition of a non-*Guidelines* sentence which spares him any period of incarceration. The Court has the full benefit of the trial evidence. The Government's sentencing advocacy consists of all too frequent mischaracterizations or overstatements of the evidence, and should not be countenanced.

Dated: Buffalo, New York
October 7, 2013.

/s/ Rodney O. Personius
Rodney O. Personius, Esq.
PERSONIUS MELBER LLP
Attorneys for Co-defendant
MARK L. KAMHOLZ
2100 Main Place Tower
Buffalo, NY 14202
(716) 855-1050
rop@personiusmelber.com

TO: AUSA Aaron Mango
U.S. Attorney's Office
Federal Centre
138 Delaware Avenue
Buffalo, NY 14202

Rocky Piagionne
Senior Counsel
United States Department of Justice
Environmental Crimes Section
601 D Street, N.W.
Washington, DC 20004

USPO Susan Murray
U.S. Probation Office
2 Niagara Square
Buffalo, NY 14202

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of October, 2013, I electronically filed the foregoing with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following:

AUSA Aaron Mango
U.S. Attorney's Office
Federal Centre
138 Delaware Avenue
Buffalo, NY 14202

Rocky Piagionne
Senior Counsel
United States Department of Justice
Environmental Crimes Section
601 D Street, N.W.
Washington, DC 20004

And, I hereby certify that I have mailed by the United States Postal Service the document to the following non-CM/ECF participants:

USPO Susan Murray
U.S. Probation Office
2 Niagara Square
Buffalo, NY 14202.

/s/ Rodney O. Personius
Rodney O. Personius, Esq.
PERSONIUS MELBER LLP
Attorneys for Co-defendant
MARK L. KAMHOLZ
2100 Main Place Tower
Buffalo, NY 14202
(716) 855-1050
rop@personiusmelber.com